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THE ARIZONA CORPORATION COMMISSION

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In the matter of:

CONCORDIA FINANCING COMPANY,  
LTD, a/k/a "CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY SERVICES,  
L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

Respondents.

DOCKET NO. S-20906A-14-0063

**RESPONDENT CONCORDIA  
FINANCE'S MOTION TO DISMISS  
REQUESTED RELIEF OF  
RESTITUTION AND  
ADMINISTRATIVE PENALTIES**

Respondent Concordia Finance (hereinafter "Concordia") moves to dismiss the demands in the Amended Notice for alleged restitution and the requested administrative penalties for violation of the constitutional right to a jury trial. Concordia has not offered or sold the alleged securities for almost eight years and has been on the verge of failing or seeking bankruptcy relief and has very limited prospects as a going concern. There is no real risk of it reoffending if its conduct is proven unlawful. Given that the Division seeks an order to cease and desist conduct by a fading entity that stopped years ago, the primary focus of this matter is its attempt to obtain financial consequences in the form of restitution and penalties. Under the Arizona Constitution, Concordia is entitled to a jury trial for these demands. Both demands are for legal remedies as debt, including for alleged contract damages. At common law, both demands included a jury right, thus, that right was preserved under the Arizona Constitution. As the Division's request for a cease and desist order is a request for an equitable ruling, this Motion does not implicate that request or the scheduled hearing as to the same.

Very briefly, the Division filed an Amended Notice of Opportunity for Hearing alleging that contracts and servicing agreements sold between 1998 and 2008 are securities, charging Concordia with sales of unregistered securities and transactions by unregistered dealers or salesmen. The Division requested an order for Concordia to pay \$3,078,909 in restitution for the alleged offenses and administrative penalties of up to \$5,000 for each alleged violation, which according to the math in the Notice, could amount to up to \$685,000. The Notice provides that a respondent may request a hearing before the Commission. The Notice provides no ability to request a proceeding before a jury, nor do the adopted procedures of the Arizona Corporation Commission. Thus, a respondent cannot effectively receive a jury trial under the set procedures, regardless of request.

**I. THE ARIZONA CONSTITUTION AFFORDS CONCORDIA A RIGHT TO A JURY TRIAL FOR THE SECURITIES DIVISION'S CLAIMS ON AMOUNTS OWED ON NOTES AND FOR AN ADMINISTRATIVE PENALTY.**

Concordia requests that the restitution and penalty allegations be dismissed, as the Commission's rules and procedures do not afford Respondents a jury trial. The Arizona Constitution contains two separate provisions preserving the right to a jury trial, Article 2, Sections 23 and 24. *Derendal v. Griffith*, 209 Ariz. 416, 419, ¶ 8 (2005) (internal citations omitted). Article 2, Section 23 preserves jury trial rights existing under the common law at the time of adoption of Arizona's constitution. "[I]t does not create or extend the right, but by its declaration there is guaranteed the preservation of such right as it existed when the Constitution was adopted." *Brown v. Greer*, 16 Ariz. 215, 217 (1914).

The Division seeks "restitution," which the Commission defines as damages, A.A.C. R14-4-308(C), and administrative penalties. The attempt to categorize the contracts Concordia sold as securities does not mask the nature of the statutory damages remedy the Division seeks. The Arizona Constitution preserved the common law right to a jury trial for such allegations. "[B]oth Article 2, Section 23, and Article 6, Section 17, of the Arizona Constitution provide in pertinent part that the right to a jury trial 'shall remain inviolate,' and apply to the damages claims here because they existed at common law at the time of statehood." *Fisher v. Edgerton*, 236 Ariz. 71, 81, ¶ 32 (App. 2014) (further citation omitted). Similarly, Concordia is entitled to a jury trial on the Division's

request for penalties. *SEC v. Jensen*, No. 14-55221, 2016 U.S. App. LEXIS 16107, at \*9-10 (9th Cir. Aug. 31, 2016) (SEC entitled to a jury trial regarding claim for civil penalties in federal court proceeding).

**A. Arizona uses the Seventh Amendment as a guide to its jury trial analysis, and Concordia is entitled to a jury trial for the restitution and penalty claims.**

Arizona has not expressly adopted the Seventh Amendment, but “[w]e interpret Arizona’s constitutional provisions protecting the right to a jury trial consistent with the Seventh Amendment.” *Fisher*, 236 Ariz. at 81, ¶ 33; *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990) (federal standards for summary judgment to protect right to jury trial under Seventh Amendment apply equally to Arizona constitutional provisions protecting jury trial rights); *see also Dombey v. Phx. Newspapers*, 150 Ariz. 476, 486 n.5 (1986) (“The analysis is the same”). Although Arizona courts rely on Seventh Amendment case law, the Arizona Constitution requires greater protection of the right to trial by jury than does the federal constitution. *Derendal*, 209 Ariz. at 419, ¶ 6.

**1. Concordia is entitled to a jury trial under the Arizona constitution in connection with its restitution claims as they are damages claims for which a jury trial right existed under the common law.**

Applying the Arizona Constitution’s jury trial rights consistent with the Seventh Amendment analysis, our courts hold that the right to a jury trial remains inviolate and preserves jury trial rights that existed at common law at the time of statehood. *Dombey*, 150 Ariz. at 486 n.5. A right to a jury trial exists in connection with damages claims, which existed at common law at the time of statehood. *Fisher*, 236 Ariz. at 81, ¶ 32-33; *Perkins v. Komarnyckyi*, 172 Ariz. 115, 118 (1992) (parties in malpractice action have right to have every issue tried by jury); *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30 (App. 2004) (defendants had a right to a jury trial on damages); *Mozes v. Daru*, 4 Ariz. App. 385, 391 (1966) (right to jury determination of liability and damages in connection with counterclaim in tort action).

Restitution is defined as damages in the Commission’s rules:

If restitution is ordered by the Commission,

1. The amount payable as damages to each purchaser shall include:
  - a. Cash equal to the fair market value of the consideration paid, determined as of the date such payment was originally paid by the buyer; together with
  - b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the date of the purchase payment to the date of repayment; less
  - c. The amount of any principal, interest, or other distributions received on the security for the period from the date of purchase payment to the date of repayment.

A.A.C.R14-4-308(C)(1) (emphasis added).

As provided above, damages claims trigger jury trial rights:

Although the claim for damages arises out of and is based upon statute, it is a claim grounded in debt. “. . . [When] a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights.”

*E.g., Grossblatt v. Wright*, 239 P.2d 19, 26-27 (Cal. App. 1951) (internal citation omitted). The governing Commission rule provides a damages remedy, and Concordia is entitled to a jury determination of that issue. *Fisher*, 236 Ariz. at 81, ¶ 32; *Chartone*, 207 Ariz. At 170, ¶ 30; *Perkins*, 172 Ariz. at 118; *Mozes*, 4 Ariz. App. at 391.

Any attempt to ignore the plain language of A.A.C. R14-4-308 and rely solely on the label “restitution” does not alter the character of the relief sought, which is legal, not equitable. In *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 206 (2002), the Supreme Court reviewed the question of whether a specific ERISA cause of action existed. The Court reviewed whether labeling the money sought as “restitution” authorized the action as an equitable action, not traditionally set in the court of law. The Court held that restitution for a claim of debt, or money owed, were not equitable claims, but instead “viewed essentially as actions at law for breach of contract,” because the plaintiff seeks a “judgment imposing a personal liability upon a defendant to pay a sum of money.” *Id.* at 212-14 (further citation and quotations omitted). By contrast, restitution claims lie

1 in equity only where the plaintiff seeks to impose a constructive trust or equitable lien on property  
2 that in essence belongs to the plaintiff, which is not the case here. *Id.* at 213-14. Because a claim  
3 for restitution for an amount allegedly owed is tantamount to claim for debt it necessarily is a claim  
4 with a common law heritage of a jury trial right. <sup>1</sup> *Id.* at 217 (noting that legal claim for debt was that  
5 governing the right to a jury trial). Under the Arizona Constitution, the restitution claims must be  
6 decided by a jury just as they were at common law.

7 **2. *Concordia is also entitled to a jury trial in connection with the Division's***  
8 ***claim for administrative penalties.***

9 The United States Supreme Court holds that requested statutory penalties in an action  
10 brought by the United States under the Clean Water Act compel a jury trial. *Tull v. United States*,  
11 481 U.S. 412, 418-19 (1987). Under the Seventh Amendment, a defendant has a right to a jury trial  
12 for any charge seeking a "civil penalty." "Actions by the Government to recover civil penalties under  
13 statutory provisions therefore historically have been viewed as one type of action in debt requiring  
14 trial by jury." *Id.* at 418-19. "This [action seeking a penalty] is clearly analogous to the 18th-century  
15 action in debt, and federal courts have rightly assumed the Seventh Amendment requires a jury trial."  
16 *Id.* at 420. In *Tull*, the Court further held that a grant of discretion to assess a monetary penalty for  
17 each day of a statutory violation was a civil penalty, with a jury trial right. In contrast, pure forms  
18 of requested equitable relief, such as to cease and desist a nuisance, were not incorporated into the  
19 Seventh Amendment. *Id.* at 422-24.

20 <sup>1</sup> There are also a myriad of the same analyses and holdings around the country. *Gipson v. KAS*  
21 *Snacktime Co.*, 83 F.3d 225, 231 (8th Cir. 1996) ("The Seventh Amendment right to jury trial  
22 extends to statutory causes of action, so long as the statute allows, and the plaintiff seeks, at least in  
23 part a legal remedy."); *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 151 (Del. Ch. 1978)  
24 ("The common law granted a civil jury trial for an action of this nature."); *Rosati v. Bos. Pipe*  
25 *Covering, Inc.*, 749 N.E.2d 143, 145 (Mass. 2001) ("The ordinary action of contract is a controversy  
26 concerning property, in which trial by jury was had as of right at the time of the adoption of the  
27 Constitution."); *Wood v. N.J. Mfrs. Ins. Co.*, 21 A.3d 1131, 1140 (N.J. 2011) ("[I]t is beyond question  
that a breach of contract claim was at common law and remains today an action triable to a jury.");  
*Scott v. Kirtley*, 179 S.W. 825, 826 (Ky. 1915) ("On the question whether or not there was anything  
due under his contract, he had the right to a jury trial at common law. The mere fact that the statute  
gives him an additional right does not deprive him of the right to a jury trial, which existed at  
common law").

1 The *Tull* Court rejected the Government's arguments that a dual action for both equitable  
2 relief and civil penalties could be intertwined into a non-jury proceeding. *Id.* at 424-25. The Court  
3 rejected that argument for three reasons, each of which applies to Division actions such as the present  
4 one. The first being that a court of equity could not enforce civil penalties. *Id.* at 424. Second, the  
5 Court noted that because the respondent in *Tull* had already ceased the challenged conduct, the  
6 "relief would be limited primarily to civil penalties." *Id.* at 424-25. Here, Concordia has not issued  
7 any of the challenged contracts for many years. And third, like Arizona's statutes, the provisions for  
8 injunctive relief and civil penalties are separate and distinct. *Id.* at 425.

9 This Seventh Amendment jurisprudence also requires a jury trial in SEC actions seeking civil  
10 penalties. Two months ago the Ninth Circuit Court of Appeals held that the SEC was wrongfully  
11 denied its jury trial rights in an action where it sought civil penalties, a legal remedy. *SEC v. Jensen*,  
12 No. 14-55221, 2016 U.S. App. LEXIS 16107, at \*9-10 (9th Cir. Aug. 31, 2016). "Parties have a  
13 right to a jury trial in lawsuits seeking legal remedies." *Id.* at \*9. That holding is not novel, as the  
14 Ninth Circuit issued a parallel, but more thorough ruling in a securities case decades ago. "The right  
15 to jury trial does not depend on the character of the overall action, but is instead determined by the  
16 nature of the issue to be tried." *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 422 (9th Cir. 1979).

17 Concordia is entitled to a jury trial in connection with the restitution and penalty claims,  
18 which must be dismissed, as the Commission cannot empanel or otherwise authorize a jury.

19 **B. The analysis of common law antecedent claims is for criminal trial rights, as**  
20 **criminal trial analysis of remedies is conducted under a separate constitutional**  
**provision.**

21 Should the Division respond alleging that a determination of a right to jury trial stems from  
22 the elements of the claims alleged, that will be in error for several reasons. First, Arizona's separate  
23 test for looking at the elements of the claim for a common law antecedent comes from the Arizona  
24 Supreme Court's separate analysis for a jury trial right in a criminal proceeding, which does not  
25 implicate the penalty, which is analyzed separately under the Article 2, Section 24, "Arizona's  
26 analog to the Sixth Amendment." *Derendal*, 209 Ariz. at 419-20, ¶¶ 10-13. Thus, review for criminal  
27 jury trial rights by necessity must look at each offense to stay true to the common law. And second,

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1 the Arizona Supreme Court's adopted guide is the common law and the Seventh Amendment, which  
2 categorically afford a jury trial on damages and penalties claims.

3 The requested remedy or civil penalty, and whether it is legal or equitable, is the guide for  
4 determination of a jury trial right in a civil matter. The Arizona Supreme Court has not strayed from  
5 that principle, and the United States Supreme Court has continually reiterated it. "[C]haracterizing  
6 the relief sought is 'more important' than finding a precisely analogous common-law cause of action  
7 in determining whether the Seventh Amendment guarantees a jury trial." *Tull*, 481 U.S. at 421. A  
8 determination that simply assigning these causes of action to the Commission can eliminate a jury  
9 right, or labeling them as new statutory causes of action with no jury trial right would violate the  
10 Arizona Constitution.

11 **II. CONCLUSION.**

12 With the exception of the request for an order to cease and desist, although moot, the  
13 requested orders of restitution and administrative penalties are legal claims that carry a jury trial  
14 right. As the Commission has no provision for exercising that right, Concordia's fundamental rights  
15 will be violated should those requests be heard at the hearing. Additionally, as the Commission has  
16 no provision for exercising that right, no request for a jury trial was necessary, as the request was  
17 and would be futile. *E.g., Winckler v. BNSF Ry. Co.*, No. 1 CA-CV 13-0516, 2015 Ariz. App.  
18 Unpub. LEXIS 380, at \*18 (Ct. App. Mar. 26, 2015). This Commission must dismiss the claims for  
19 alleged restitution and administrative penalties.

20 RESPECTFULLY SUBMITTED this 31st day of October, 2016.

21 BASKIN RICHARDS PLC

22  
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